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Supreme Court of the United States

OCTOBER TERM, 1949.

BURMAN PROPERTIES, INC., ET AL., *Petitioners*,

v.

ROSCOE L. MCKINNEY, ET AL., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILKES, MCGARRAGHY & ARTIS,
JAMES C. WILKES,
JAMES E. ARTIS,
Counsel for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1949.

BURMAN PROPERTIES, INC., a Corporation and LOUIS BURMAN, *Petitioners,*

v.

ROSCOE L. MCKINNEY, BERTIE D. BARNETT, CLOTILDA A. BARNETT, WALTER G. DANIEL, THEODORA W. DANIEL, THOMAS H. BRYANT, LILLIAN I. BRYANT, KERMIT ALBERT BANKS, EDNA MAE ROBINSON, PERCY A. FITZGERALD, ARTIE B. FITZGERALD, SARA COATES, BERTHA C. ANDERSON, ELPHANZO W. FREEMAN, DOROTHY G. BALLARD, LYDIA M. HILLMAN, AMBROSE CALIVER and ROSALIE CALIVER, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable, the Judges of the Supreme Court of the United States:

Petitioners, Burman Properties, Inc. and Louis Burman, respectfully show as follows:

That petitioner, Burman Properties, Inc., is a corporation organized and existing under the laws of the State of Delaware, and Louis Burman is a citizen of the United

States, and a resident of the District of Columbia. The respondents, Roscoe L. McKinney, Bertie D. Barnett, Clotilda A. Barnett, Walter G. Daniel, Theodora W. Daniel, Thomas H. Bryant, Lillian I. Bryant, Kermit Albert Banks, Edna Mae Robinson, Percy A. Fitzgerald, Artie B. Fitzgerald, Sara Coates, Bertha C. Anderson, Elphanzo W. Freeman, Dorothy G. Ballard, Lydia M. Hillman, Ambrose Caliver and Rosalie Caliver, are citizens of the United States, residents of the District of Columbia, residing within the bounds of the John Sherman, trustee, subdivision hereinafter mentioned.

The respondents filed a complaint in the United States District Court for the District of Columbia on October 30, 1947, to enjoin the completion of certain construction work then going on and which had been going on for some period of time by petitioners, Burman Properties, Inc., over a 30 foot private building restriction line created in 1881, when the John Sherman, trustee, subdivision first came into being.

Petitioners by way of defense set forth: (a) That the covenant since its creation more than 60 years ago, had become outmoded and violated repeatedly throughout the subdivision; (b) that each and every respondent was himself a violator thereof; (c) the objects being unattainable because of the great number of uncontemplated changes in the area wrought over the years since its creation, should not be enforced; (d) every respondent or his predecessor in title having built over the line for such distances as suited their purposes, petitioners should pro tanto be permitted to build over the line as far as respondents have already done so; and (e) permit respondents to enjoy and use their residential properties extending over the restriction line from 6 to 14 feet, and at the same time to deny petitioners the right to use and enjoy their commercial property over the restriction line, the same distance, is an unfair discrimination in favor of the owners of residential property against the owners of commercial property and violative

of petitioners' rights under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

After a preliminary and final hearing in the United States District Court for the District of Columbia, a decree was entered not only enforcing the covenant but requiring petitioners to erect their structure BACK BEHIND those of respondents which extended over the restriction line for varying distances from 3½ to 14 feet and to tear down so much of their structure already erected that extended for any distance at all over the restriction line.

An appeal was taken to the United States Court of Appeals for the District of Columbia Circuit and a supersedeas bond put up conditioned for the demolition and removal of that part of petitioners' structure extending any distance over the alleged restriction line. After hearing, said appellate court affirmed the ruling of the lower court, and to reverse the judgment of the Court of Appeals, certiorari is hereby sought.

SUMMARY STATEMENT OF MATTER INVOLVED.

On October 30, 1947, respondents filed a complaint in the lower court to enjoin petitioners from continuing construction of a building on Lots 800 and 809 in Square 2842 owned by petitioners and located on the northwest corner of 11th and Lamont Streets, N. W., in the District of Columbia. Respondents contended that petitioners were violating a 30 foot building restriction line covenant CREATED IN 1881 by John Sherman, Trustee, in a subdivision known as Sherman's Subdivision and also as Columbia Heights, providing as follows:

> "By condition of all the deeds I have executed as trustee for the original properties of this subdivision, the building line of all lands in said subdivision north of Clifton Street is fixed at not less than thirty (30) feet from the street line on which the lots front.
>
> (Signed) JOHN SHERMAN,
> *Trustee.*"

Throughout the subdivision, which is bounded on the south by Florida Avenue, on the north by Park Road, on the west by 14th Street, and on the east generally by 11th Street (see petitioners' Exhibit 13) involving many city blocks, there has been no uniform observance of the building restriction line covenant (Exhibits 1-A, 1-B, 1-G, 7, 11, 12-B, 12-L and 13).

Diagonally across the street from petitioners' property at 11th and Lamont Street (not more than 35 yards away) on Lamont Street and next to the building on the southeast corner, the lot being partially in and partially out of the subdivision, the building extends out to within 6 feet of the sidewalk line. One block from petitioners' property at 11th and Kenyon Streets on the southwest corner and within the subdivision, there is a full and complete waiver, the Safeway Store having been built over the line on Kenyon Street for the full 30 feet and extending a distance along Kenyon Street over 53 feet. (See petitioners' Exhibits 8, 1-C and 12-K).

Uncontradicted testimony at the trial showed that of all the corners examined, commencing on the east side of 14th and Fairmont Streets and proceeding north to Park Road, east on Park Road to 11th and south on 11th to Girard Street, omitting the corner at Irving Street because out of the subdivision, there are a total of 23 corners. Of the 23, 17 are commercial. Of the 17 commercial corners, 14 are built out over the 30 foot restricted area on 11th or 14th Street, as the case may be, and out over the intersecting streets running east and west as well. The three remaining commercial corners are built out over the 30 foot area on 11th or 14th Streets. Of the seven remaining non-commercial corners, three are built out over the 30 foot area on 14th Street or 11th Street and out over the intersecting streets running east and west, and two are built out over the 30 foot area on 11th or 14th Streets. Therefore, out of a total of 23 corners, 22 do not conform to the covenant (R. 87, 88 and 89).

Further, on Lamont Street itself between 11th and 13th Streets, each and every one of respondents have themselves violated the covenant they seek to enforce. The "outside walls of the buildings" (R. 64 and 65) three stories high, extending from ground to roof, of respondents are built over the 30 foot restriction line for distances ranging from 6 feet to 3½ feet. In addition, there are large covered porches and steps, some of brick and solid stone, forming substantial parts of the buildings, built out extending over the restriction line for distances ranging from 8 feet up to 14 feet (R. 66 and 67).

Although no attempt was made to cover the whole subdivision, violations were also proven within the subdivision on Park Road between 11th and Sherman Avenue (See Petitioners' Exhibit 13), on north side of Girard Street at its intersection with 13th Street (Petitioners' Exhibit 11), on north side of Kenyon between 13th and 14th Streets (Petitioners' Exhibit 12-L), on east side of 14th Street at its intersection with Fairmont Street (Petitioners' Exhibit 1-B), on the east side of 14th Street north of Clifton Street (Petitioners' Exhibit 1-C) on north side of Girard Street between 13th and 14th Streets (Petitioners' Exhibit 1-A), and on the east side of 14th Street between Clifton and Belmont Streets (Petitioners' Exhibit 1-D).

Aside and apart from the many waivers, the neighborhood has since the time of the creation of the covenant, undergone a great change from that originally planned and contemplated.

Eleventh Street, which did not exist or appear on the plat creating the subdivision, was acquired and "cut through" by the District of Columbia by condemnation, thus introducing into the subdivision a street not bound by the 30 foot restriction line, a situation not contemplated by the creators and planners of the subdivision. There followed later, after investigation by the Zoning Commission of the District of Columbia (whose prerogatives and functions are more particularly hereinafter dealt with) a change

in zoning of much of the property along 11th Street, including that of petitioners, from residential to commercial (R. 33). Thereafter, stores, gasoline stations, restaurants, shoe maker shops and other types of business establishments were erected on land originally intended for residences. A double car line was laid on 11th Street. Many people and much traffic were attracted to the area by reason of the change and the commercial uses to which the property could be put. Real estate values steadily mounted and increased. Along 14th Street, similar happenings, not at all in keeping with the covenant plan for the subdivision, were taking place. This street too became commercialized with all types and kinds of business uses to serve the public better in that area (Ex. 1-B, 1-C, 1-D). In fact, on 14th Street, in addition to first commercial zoning, some of it was zoned second commercial, to permit other uses not available in a first commercial area (R. 34). Almost without exception, the commercial corners were built out over the 30 foot restricted area and in most of the cases, not only on 11th or 14th Street, but also out over the 30 foot restricted area on the intersecting side streets as well (R. 88 and 89).

The Zoning Commission of the District of Columbia consists of the three Commissioners of the District of Columbia, A. E. Demaray, Director of the National Park Service, and David Lynn, Architect, U. S. Capitol, and is charged with the duty of determining what changes in zoning should be made in the interests of the public at large. In this case, it had been determined that there was a need for a certain amount of commercial land in the vicinity of 11th and Lamont Streets, N. W., and, accordingly, the zoning of the whole of petitioners' lots had been changed from residential to first commercial. There was, therefore, in this case an administrative determination by that body lawfully charged with the duty, that the public interest required so much commercial ground in order to serve the needs of the entire area.

Further, petitioners prior to the commencement of the construction of the store building on said corner had been

regularly and lawfully granted by the proper Municipal Authorities all required licenses, including a building permit, to erect their structure in the manner and at the place the same was erected.

No evidence of any kind was introduced by respondents at the trial to show that they had or would be damaged in any way by the erection of petitioners' structure. On the other hand, it was amply proven that petitioners would suffer tremendous damage, amounting to tens of thousands of dollars, by the enforcement of the covenant. (R. 35-44).

It was shown that construction work on the 30 foot restriction line had been in continuous progress in open view of respondents for 6 weeks (R. 50-57-58), all of whom lived on the same street where the operation was going on, before they filed, without any notice or warning to petitioners, their complaint for injunction on October 30, 1947.

PETITIONERS' CONTENTIONS.

1. The covenant since its creation in 1881 has repeatedly been waived in the subdivision in the area of petitioners' property, and is therefore unenforceable.

2. Every respondent in this case being guilty of violating the covenant to the extent that suited his purpose, cannot thereafter enforce the same against petitioners.

3. The objects of the covenant being unattainable because of the great number of uncontemplated changes, and happenings wrought over the many years since its creation in 1881, the covenant will not be enforced.

4. Every respondent or his predecessor in title having built over the line for such distances as suited their purposes, petitioners should pro tanto be permitted to build over the line as far as respondents have already done so.

5. To permit respondents to enjoy and use their residential properties extending over the restriction line from 6 to 14 feet and at the same time to deny petitioners their

right to use their commercial property over the restriction line the same distance, is an unfair discrimination in favor of the owners of residential property against the owners of commercial property and violative of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

I.

The Covenant Having Been Numerously and Repeatedly Violated, is Unenforceable.

The evidence in the case was uncontroverted that the covenant involved in this case since its creation in 1881 had been numerously and repeatedly violated at many places throughout the subdivision and in fact, not a single building of respondents themselves complied therewith. (See "Summary Statement of Matter Involved," pages 3 to 7 of this petition.)

II.

Respondents, Each and Every One of Whom had Themselves Violated the Covenant, Could not Enforce the Same Against Petitioners.

There was introduced into the evidence as petitioners' Exhibit No. 7, a scaled plat made as the result of an actual survey of the properties of respondents and those of petitioners along Lamont Street, which undeniably showed that each and every respondent seeking to enjoin petitioners was himself guilty of first having violated the covenant sought to be enforced.

III.

The Objects of the Covenant Being no Longer Attainable, Its Enforcement will be Denied.

The object of this covenant and others placed upon the properties of the subdivision at the time of its creation in 1881 was obviously to create and preserve a high-class residential neighborhood.

The fact is on the other hand, that at the time of the filing of the suit of respondents, much of the area had changed from residential to commercial (petitioners' property being zoned for commercial use as was that on all 4 corners at 11th and Lamont Streets) and all kinds of commercial uses were located there, including among others, gasoline stations, restaurants, shoe repair shops, furniture stores, grocery stores and the like. Many people and much traffic so unsuited to a residential use were attracted to the area.

IV.

Every Respondent or His Predecessor in Title Having Built Over the Line for Such Distances as Suited Their Purposes, Petitioners at All Events, Should, Under the Doctrine of Pro Tanto be Permitted to Build Over the Line as Far as Respondents Have Already Done.

The evidence on this point was to the effect that the FRONT WALLS of the buildings of respondents extended over the restriction line for varying distances up to 6 feet. That in addition to the front walls of the buildings of respondents extending over the line up to 6 feet, it was shown that the solid brick porches and steps extended over the line up to a distance of 14 feet.

The lower court in its decision simply ruled that petitioners were not entitled to build over the line a distance of 14 feet but did not pass at all upon petitioners' right to build over the line 6 feet. The Court of Appeals in its decision adopted the decision of the lower court. This left completely undecided the point raised in each court as to petitioners' right to build over the line for a distance of 6 feet, which was the greatest extent the front walls of the houses of respondents themselves extended over the restriction line they sought to enforce.

It is respectfully submitted that petitioners are entitled to a ruling on this point.

It is further respectfully submitted that upon a consideration of this point on the plainest principles of equity and

fairness, petitioners should not be required to build the walls of their building 6 feet behind the outside walls of respondents' buildings, which is what the United States District Court and the Court of Appeals have ruled petitioners will have to do.

It is further respectfully submitted that no distinction on any basis of use, of construction, of deprivation of light and air, or on any other conceivable basis can be made between petitioners' building and those of respondents at least to the extent of 6 feet.

The respondents are and have been making a lawful use of their respective properties located for various distances over the restriction line, (the owner of Lot 83 in Square 2842 having gained unto himself by the erection of the outside walls of his building 6 feet over the line from ground to roof with a width of 28 feet, approximately 315 square feet of liveable useable space inside his building, all located over the restriction line), and petitioners if they build 6 feet over the restriction line would be making a perfectly lawful use of their building, their property being zoned commercial and the use made of it being commercial.

As to deprivation of light and air, there can be no question but that the buildings of respondents, and particularly the one located on the northeast corner of 13th and Lamont Streets, where there is a 6 foot extension 3 stories high, would shut out more light and air for a distance of at least 6 feet than would the one-story building of petitioners extending over the restriction line the same distance.

In view of the foregoing, it is respectfully and earnestly submitted that the petitioners, in any view of the matter, are entitled to do what respondents have already done, or acquiesced in the doing of, namely; build out over the restriction line for a distance of 6 feet.

V.

To Permit Respondents to Use and Enjoy Their Residential Properties Extending 6 Feet Over the Restriction Line and at the Same Time to Deny Petitioners the Right to Use and Enjoy Their Commercial Properties Over the Restriction Line for the Same Distance, is an Unfair Discrimination in Favor of the Owners of Residential Property Against the Owners of Commercial Property and Violative of the Rights of Petitioners Under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

To permit respondents to use and enjoy their properties ranging up to 6 feet over the restriction line for residential purposes, and at one and the same time, to deny petitioners the right to use and enjoy their commercial property up to 6 feet over the restriction line, is an unfair discrimination against commercially-zoned property in favor of residentially-zoned property. It is respectfully submitted that there is no reasonable basis in law, fact or upon any other conceivable hypothesis why an owner of commercially-zoned property should not be permitted to use the same for lawful commercial purposes where the owners of residentially-zoned property have already made use of their properties up to 6 feet of solid enclosures over the restriction line for the benefit of their residential properties.

It is further submitted that to permit owners of residentially-zoned property in a subdivision to use and enjoy their properties for residential uses up to 6 feet over the restriction line and to deny the same right and privilege to owners of commercial property is not only an extremely unfair discrimination in favor of owners of residentially-zoned properties, but is flagrantly in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

REASONS FOR ALLOWANCE OF THE WRIT.

I.

By its opinion and judgment, the Court of Appeals has effectually destroyed valuable property rights of petitioners.

II.

By its opinion and judgment, the Court of Appeals has unlawfully discriminated in favor of the owners of residential property against an owner of commercial property.

III

The Court of Appeals by its opinion, in holding that owners of residential property may build over the restriction line while an owner of commercial property may not, being the same covenant in each case, not only unlawfully discriminates in favor of one class of property owners against the other but also violates petitioners' rights under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED.

1. Did the Court of Appeals err in ruling that a covenant common to all could be violated repeatedly over the years and then at a later time enforced?

2. Did the Court of Appeals err in ruling that respondents each and every one of whom had themselves violated the covenant, could nevertheless enforce it?

3. Did the Court of Appeals err in ruling that despite the facts, respondents themselves had built over the restriction line with solid walls up to 6 feet and with brick porches and steps up to 14 feet that nevertheless petitioners must erect their building back behind those of respondents?

4. Did the Court of Appeals by its ruling in refusing to permit an owner of commercial property to build over the

line as far as residential owners had already done, violate the rights of the owners of commercial property under the Fifth Amendment to the Constitution?

JURISDICTION.

The jurisdiction of the court is invoked under Sections 346 and 347 of the Judicial Code and Judiciary, 28 U.S.C.A., as amended by Sec. 1254 (1).

The date of the final order of the Court of Appeals denying rehearing was May 5, 1949, (R. 111).

ERRORS RELIED UPON.

The Court of Appeals erred in affirming the decision of the lower court:

(1) In holding that a covenant common to all which has been repeatedly and numerously violated, may nevertheless thereafter be enforced.

(2) In holding that respondents, each and every one of whom had themselves violated the covenant, could nevertheless enforce it against petitioners.

(3) In holding that petitioners, owners of commercially-zoned property, could not build out as far over the building restriction line as respondents, who were owners of residentially-zoned property, had already done, all parties being affected by the same covenant.

PRAYER.

WHEREFORE, petitioners pray that this Court allow this petition for certiorari directed to the Court of Appeals for the District of Columbia Circuit to bring up the record of this cause here to review the judgment of the said Circuit Court of the District of Columbia entered in this cause.

WILKES, MCGARRAGHY & ARTIS,
JAMES C. WILKES,
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Attorneys for Petitioners.

BRIEF.

ARGUMENT.

I.

Covenant Waived and Unenforceable.

Where parties or their predecessors in title have stood without objections, allowing violation after violation to take place, it is submitted that their right under the covenant is thereby waived.

II.

The Court Erred in Holding that Respondents, Each of Whom had Violated the Covenant, Could Nevertheless Enforce the Same Against Petitioners.

The evidence in the case was uncontradicted on this point, petitioners Exhibit No. 7 showing each respondent had violated the covenant for varying distances, from 3½ feet up to 14 feet.

Directly in point are the cases of:

Curtis v. *Rubin,* 244 Ill. 88, 91 N.E. 84 (Supreme Court of Illinois) wherein the complainants had erected buildings 3 or 4 feet over the building line themselves and sought to enjoin a greater violation by defendant. The Court in its opinion deciding the case at 91 N.E. pages 85 and 86 stated:

> "There was, however, no observance of the building line by the complainants or other owners of the lot. The bays which extended into the reserve space over the building line and ran up the whole height of the houses on the same foundations and with the same walls were violations of the restriction. *Linzee* v. *Mixer,* 101 Mass. 512, 5 American and English Encyclopedia of Law, 2d Ed. page 7. * * * We do not think that the complainants who had disregarded * * * the building line created for the plat could be heard to object that the defendants were violating the condition to a greater extent than they were."

In *McGovern* v. *Brown*, 317 Ill. 73, 147 N.E. 664, 666,

> "It appeared that three of the five complainants owned adjacent buildings and porches, bays and steps thereon extending beyond the building line as much as 8 or 9 feet."

The Court in its opinion denying relief at 147 N.E. page 666 said:

> "(6) The controlling fact in favor of defendants is that if there was a building line established for the benefit of the other lots and lot owners in the south half of the block *and if defendants had notice of such restriction when they purchased their lots,* complainants are not in a position to demand compliance with the restriction as they have by their acts and conduct disreagarded the restriction and have acquiesced in other builders on the lots disregarding it. The facts in the record disclose, as already shown, that not a single person who has bought a lot in the south half of the block and has built upon it has complied with the restriction, but all of them have violated it. The encroachments upon the building restriction are substantial in every instance, and the owners of the vacant lots and the complainants in this suit have stood by and acquiesced in these substantial violations of the building line restriction, and three of complainants have themselves violated it in constructing their buildings. Under the previous decisions of this court complainants cannot and will not be allowed to enforce the restriction against the defendants. *Curtis* v. *Rubin,* 244 Ill. 88, 91 N.E. 84, 135, Am. St. Rep. 307; *Ewertsen* v. *Gerstenberg,* supra; *Kneip* v. *Schroeder,* 255 Ill. 621, 99 N.E. 617, Ann. Cas. 1913 D, 426." (Italics supplied.)

In the case of *Kneip* v. *Schroeder,* 99 N.E. 617, plaintiffs sought to enjoin the violation of a building restriction line when they themselves were already in violation thereof. The court in denying the complaint in its opinion in deciding the case at page 619 said:

> "There are 9 buildings on the east side of Janssen Avenue and 14 on the west side all of which are front-

ing upon said avenue. All of these buildings, with a single exception, have projections, such as steps, porches, bay windows and the like extending beyond the building line. Thus, the building on the opposite side of the street from the Schroeder building, on lot 28, which is the only building south of the elevated railroad is a two-story and basement frame building, the main wall of which is nine inches over the building line, and a bay window extends along the front of the building occupying nearly three-fourths of the entire width of the front and extends four feet nearer the street than the building line. North of the elevated railroad, on the west side of the avenue, the first building is on lot 30, which is a three story and basement brick building, which has a square projection commencing near the corner of the south wall of the building and extending about eleven feet in width, running from the basement to the roof. The extension is practically *four feet* over the building line and the porch and steps are nine feet over the building line. The next building, on Lot 31, is a two-story frame, which has an extension, consisting of a combination bay and porch, along the entire front of the building which encroaches upon the space beyond the building line *four feet*. A similar condition exists in relation to practically all of the buildings on the west side of the street, and the condition is the same on the east side.

"Without taking the time to describe each building, it may be said that all of these buildings, with one exception, have extensions as above described from 2 to 9 feet beyond the building line and in many instances the main wall of the building is slightly over the building line. *Most of these extensions were as high as the first story of the building itself and were a part of the building itself* * * *. Restrictions upon the use of property such as claimed here are imposed for the benefit of the several lots and give to the purchasers a right in the nature of an easement, which will be protected in equity against the grantees of the lots. (*Hutchinson* v. *Uhlrich*, 145 Ill. 336, *Curtis* v. *Rubin*, 244 Ill. 88, 91 N.E. 84). In the case last above cited this court had before it a situation very close to that presented by this record. There certain property owners who had themselves encroached beyond the

building line with projection or swell fronts or bays sought to enjoin another lot owner from erecting a building without reference to such building line, and it was held that the complainants, who had themselves disregarded the building line, were in no position to ask a court of equity to enforce the restriction against others. This court in that case, on page 94, said: 'Unquestionably, if they had observed the line themselves and not assented to its violation by others, equity would have protected their rights, but they disregarded the building line to the extent that it suited their desires or convenience to do so, and the only question between them and the defendants related to the extent or degree to which the restriction could be ignored. We do not think that the complainants, who had disregarded the restriction * * * created by the plat, could be heard to object that the defendants were violating the condition to a greater extent than they were.'" (Italics supplied.)

In the leading case on the subject, that of *Ewertsen* v. *Gerstenberg*, 51 L.R.A., 310, which is cited most frequently with approval in other jurisdictions, including the District of Columbia, (see *Castelman* v. *Avignone*, 56 App. D.C. at page 258) and by text writers; complainants, who had violated a 30 foot building restriction line sought to enjoin the defendant, who by his proposed building, would extend further over the line than they. The lower court applied the waiver pro tanto doctrine and held that the defendant could build over the line as far out as complainants had done, but no further. On appeal, the Supreme Court of Illinois ruled that plaintiffs, having themselves first breached the restriction line, could not enforce the same against defendant, rejecting the waiver pro tanto doctrine in this case, and permitted defendant to build out the full distance. The Court, in its opinion at pages 314 and 315 in deciding the matter said:

"While the facts show there are many buildings having their fronts 30 feet back from the building line, we find no evidence either in testimony or in the agreed

facts of any uniform observance by the property owners * * *. Under these circumstances, ought a court of equity enjoin Ewertsen from encroaching with his building upon said space when all others who have constructed buildings on that side of the block have done so though to a less extent perhaps than he seeks to do and without any attempted hindrance on the part of the complainants. We are of the opinion that it would be inequitable to grant such relief. * * * It certainly cannot be contended that all other lot owners could disregard the restrictions and invade and build upon said open space to the extent that suited their interest, convenience or pleasure * * * and still retain the equitable right to enforce such restrictions against him."

III.

Where the Objects of a Covenant Causing its Creation are no Longer Attainable, it will not be Enforced.

Where because of change of neighborhood or for other reasons, the objects for which the covenant was created can no longer be attained, enforcement thereof will be denied. (For factual testimony covering this point, see pages 8 to 9 of the petition).

The "change of neighborhood" means not only within the covenanted subdivision, but also changes outside so close thereto as to have a bearing thereon.

In the case at Bar, there have been so many changes within and so close outside the covenanted area as to have a bearing thereon, that the purpose originally intended to be effected by the covenant are no longer possible of accomplishment.

In this connection, the Court's attention is invited to the recent case of *Hundley* v. *Gorewitz*, 77 App. D. C., 48, involving the self-same subdivision as in the case at Bar, wherein the Court recognized that the area was undergoing a definite change from that intended and recognized that the purposes of the covenant involved in that case could not be realized by its enforcement because that which was for-

bidden existed in the immediate area outside the land covered by the covenant, and that to enforce the same would not bring to the parties the benefits expected and intended. Likewise, in the case at Bar, tearing down the building and enforcing the covenant, will not bring about the result intended by the covenant, because there will be seen just a number of yards away the very thing the covenant forbids. The case at Bar is much stronger than the Hundley case because, in addition to seeing a short distance away the very thing forbidden by the covenant, the residents of the subdivision have stood idly by and allowed the subdivision to become literally riddled with violations, in addition to all of which, each appellee herein has been guilty of violating the very covenant now sought to be enforced.

IV.

Petitioners Under Doctrine of Waiver Pro Tanto Should Have Been Permitted to Build Out as Far as has Already Been Done.

There runs throughout the gamut of law relative to building restriction line covenants, a doctrine thoroughly recognized known as the "waiver pro tanto doctrine." The gist of all rulings predicated upon this principle is that "to the extent the covenant has been violated by complainants or others, enforcement thereof to that extent" against another will be denied.

In High on Injunctions, Vol. 2, page 114, 4th Edition, the rule is set forth:

> "* * * Every relaxation which plaintiff permits in allowing erections to be made in violation of the covenant, amounts pro tanto to a disaffirmance of the obligation."

In the case of *Lattimer* v. *Livermore*, 72 N. Y. Reports, 174, wherein the property of the plaintiff who sought an injunction against the defendant, extended over the restriction line, the Court in determining that defendant would

likewise be entitled to build out to the same extent, in deciding the matter, in its opinion at pages 183 and 184 dealing with this precise point said:

> "* * * But the extension to the rear of the house on the Ludlow lot may within the principals above laid down have extinguished a portion of the plaintiff's easement and the judgment below may thus have more extensive operation than it ought. Therefore, to protect the defendant's rights, the judgment must be so modified as to be without prejudice to the right of the defendant to extend his house in the rear to the same extent and height as the extension on the Ludlow lot, and as thus modified, it must be affirmed without costs to either party."

In the leading and often cited case of *Ewertsen* v. *Gerstenberg, supra,* the lower court recognized the doctrine and ruled that the defendant could build over the restriction line as far as any of the plaintiffs already had done who sought to enjoin.

The lower court in its memorandum opinion in the case at bar in dealing with this point ruled petitioners could not build over the line 14 feet, the furthermost distance over the line of the open porches and steps, but what about the solid walls 6 feet over the line, approximately 20 feet in length, 3 stories in height, and giving to the owner of the property 315 square feet of profitable, livable, useable space, all located over the restriction line. No question but that for distances ranging up to 6 feet the 3 story buildings of respondents shut out more *light, air* and *view* than would petitioners' 1-story structure, built out the same distance, yet even this was denied petitioners and they were ordered to tear down so much of their structure as extended any distance over the 30 foot line, and move back behind the buildings of complaining respondents.

It is submitted no distinction can be made between petitioners' or respondents' property either upon the construction or use of the buildings involved. The respondents are making lawful use of their residentially-zoned property,

and likewise petitioners are making a lawful use of their commercially-zoned property. If respondents can lawfully use additional footage over the line for varying distances, then likewise petitioners should be permitted to do the same in the lawful use and enjoyment of their property.

V.

Permitting Respondents to Use Their Residential Properties Extending Six Feet Over the Line and at the Same Time to Deny Petitioners the Right to use and Enjoy their Commercial Property Over the Restriction Line for the Same Distance, is not Only an Unfair Discrimination in Favor of the Owners of Residential Property Against the Owners of Commercial Property, but is also Violative of the Rights of Owners of Commercial Property Under the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

There can be no real doubt in this day and age in light of the development of the law, that owners of commercial property are entitled to equal treatment with owners of residential property, whether the matter involved be a restrictive covenant or something else.

In this case, the treatment accorded and afforded owners of residential property is far more favorable than that accorded the owners of commercial property, both types of ownership being affected by the self-same covenant. As to the residential property ownership, they have been permitted to build out the solid front walls of their houses from 3½ to 6 feet, and to profitably use the enclosed spaces therein. Petitioners, as owners of commercial property, have been treated otherwise. They have been placed under court order not to build the front walls of their structure for any distance whatever over this same restriction line. Upon what basis is this distinction predicated?—The definite answer is none at all. And in this connection, the Court's attention is invited to the opinion of the United

States District Court and that of the Court of Appeals, which adopted the opinion of the United States District Court, neither of which sets forth or attempts to justify therein any distinction in the treatment afforded residenial property as against commercial property.

VI.

The Erection of Stores Upon the Restricted Area is in the Interest of the Public in General and its Denial Benefits But a Few Private Individuals.

Since the creation of the covenant in the case at Bar, many years ago, numerous changes have taken place. Since that time, due to the natural growth of the City, the Zoning Commission for the District of Columbia, who lawfully has jurisdiction in such matters, after a full and complete hearing, determined that there is a need by the public in general for a certain number of square feet of commercial ground in the vicinity of 11th and Lamont Streets, N. W. The rigid enforcement of the covenant would serve the needs of but a few private individuals on Lamont Street, whereas the erection of stores on the land over the restriction line would serve all of the people beneficially throughout the entire area.

It is submitted that the general good of the public at large should outweigh the benefits to a few private individuals.

CONCLUSION.

Wherefore, it is respectfully suggested that the judgment and opinion of the Court of Appeals is erroneous in that this Court should grant the Writ and take this case for decision.

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